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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-148

No. ~~1682~~

WENDELL N. DeBOSE,

Petitioner,

versus

THE M/S LOPPERSUM, etc., et al,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on February 11, 1971.

CITATIONS TO OPINION BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is unpublished but is reproduced, infra, as Appendix A. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at _____ F. 2d _____ and is reproduced, infra, as Appendix B.

JURISDICTION

The Judgment of the Court of Appeals is dated Feb-

ruary 11, 1971. There was no application for rehearing filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Does an error in judgment made by a longshoreman when responding to an unseaworthy condition defeat recovery by that longshoreman for resultant injuries under some theory of operational negligence?

2. Is an unsafe stow sufficient to render a vessel unseaworthy?

STATEMENT OF THE CASE

This cause commenced as a suit in the United States District Court for the Eastern District of Louisiana by Wendell N. DeBose seeking compensation for personal injury received aboard a vessel at the Port of New Orleans. DeBose had been employed as a longshoreman. The vessel and her owners were named as defendants.

DeBose was one of a group of men loading bundles of lumber into the ship.

"[D]ifficulty was experienced in the placement of one of the last bundles."[1] DeBose got under the coaming

[1]From the opinion of the Court of Appeal. In the transcript we find: "Now other than the possibility of some dunnage being cocked the wrong way, or the load digging into some dunnage that might be too soft, what else can you suggest to us that is the reason why the lumber did not go into position when the men

in a crouched position in order to push. He hurt himself when he did so. His maneuver did cause the bundle to go into place.

After a trial to the Court without a jury the suit was dismissed. The findings of fact and conclusions of law of the District Court are found in appendix A. Relying on *Usner v. Luckenbach*, 397 U.S. 933 (1971), the Court of Appeals for the Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

The holding of the Fifth Circuit is in conflict with *Waldron v. Moore-McCormack Lines*, 386 U.S. 724 (1967) and with *Usner v. Luckenbach*, 397 U.S. 933 (1971). Among other things *Waldron* teaches that the mere attempt to make the body do more than it can do in safety is not conduct sufficient to bar recovery. Particularly this is so when the effort expended is necessary to overcome an unseaworthy condition. For after all, *Usner* teaches that if there is an unsafe condition in being the unseaworthiness follows.

The error of the Court of Appeal makes serious inroads into the traditional protection offered those to whom is due the warranty of seaworthiness. In effect it holds that where a longshoreman undertakes to work despite an unseaworthy condition he thereby bars his own recovery if he is injured. T[illegible]s assumption of risk

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first tried to get it into position? A That's about the only thing I can think of, unless it was too tight on the bundles or something, or maybe hit a band or something." Testimony of foreman App. 133.

becomes a defense; thus it is only those conditions not connected with the work at hand that will permit recovery. This is not the holding of *Usner*. *Usner* makes it clear that where an unsafe condition contributes to an injury recovery will be permitted.

ARGUMENT

If it be established that there was an unseaworthy condition which contributed to the injury then recovery should follow. Questions of the negligence, if any, of DeBose are then questions more properly considered in mitigation of damages, and do not direct themselves to recovery in the first instance. *Socony-Vacuum vs. Smith*, 305 U. S. 424 (1938).

DeBose was confronted with a load of cargo that would not move when he attempted to move it in the conventional manner. It was "hung up". Either the cargo or the space which it was to occupy was unfit given the method being used to stow. The conclusion is inescapable that an unseaworthy condition concerning the stow existed at the time DeBose adopted unconventional methods to overcome the defect. Defects in cargo and in the stow will render a vessel unseaworthy. *Morales vs City of Galveston*, 370 U. S. 165 (1962). The fact that the stevedoring company may itself have created the unsafe condition is no defense to the shipowner. *Alaska S. S. Company vs Petterson*, 347 U. S. 396 (1954).

CONCLUSION

Unseaworthiness in loading and unloading a vessel renders the vessel liable to the injured longshoreman, particularly under the circumstances and cases set forth above. For the reasons assigned the Writ of Certiorari should issue.

RESPECTFULLY SUBMITTED:
GARRETT, CARL & ROUSSEL

BY _____
CLIFTON S. CARL

CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been served upon opposing counsel by placing a copy of same in the United States Mail, postage prepaid.

New Orleans, Louisiana, Louisiana, this ____ day of May, 1971.

_____
CLIFTON S. CARL

APPENDIX A

Filed: Feb. 11, 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30300

WENDELL N. DEBOSE,
Plaintiff-Appellant,
versus

THE MS LOPPERSUM, ETC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(February 11, 1971)

Before CLARK, Associate Justice,* and GEWIN and RONEY, Circuit Judges.

PER CURIAM: The plaintiff-appellant sued the ship and her owner claiming damages for personal injuries alleged to have been sustained while he was

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***Associate Justice United States Supreme Court (Ret.), sitting by designation.**

working as a longshoreman aboard the ship in the Port of New Orleans. The complaint charged negligence and unseaworthiness. The district court entered findings of fact and conclusions of law and rendered judgment for the ship and the owner. We affirm.

While the plaintiff and others were loading bundles of lumber aboard the ship, *difficulty was experienced in the placement of one of the last bundles.* The plaintiff elected to go beneath the deck to guide the bundle into place and he contends that while he was "guiding" the lumber he injured his back. The district court found from the evidence that the equipment involved was reasonaby fit for use in stowage of the cargo in question and that the method of stowage was reasonably safe. The court further found that the plaintiff's election to go beneath deck was his own decision and was not ordered or recommended by the vessel owners or the stevedoring company for which he worked. Giving full consideration to all of the facts, it was decided that the plaintiff had failed to prove by a preponderance of the evidence that the defendants did not furnish the plaintiff a seaworthy vessel nor did the plaintiff show that his injury was caused by any negligence attributable to the defendants or by an unseaworthy condition. The court concluded, therefore, that the injury to the plaintiff was "the result of his own actions and not of any unseaworthy condition, insufficient personnel or equipment, or improper or reasonably unsafe method or negligence on the part of anyone except himself."

Our review of the record and the contentions of the parties convinces us that the trial court did not commit

error. *Usner v. Luckenbach*, 39 U.S.L.W. 4146 (U.S. January 25, 1971); *Santiny v. Coastal Boat Operators, Inc.*, ____ F.2d ____ (5th Cir. 1971) [No. 27986, February 1971]; *Reed v. M/V Foylebank*, 415 F.2d 838 (5th Cir. 1969).

Judgment AFFIRMED.

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted)

Filed: Apr. 1, 1970

Clifton S. Carl, Esq.
Garrett & Carl
For Plaintiff

Eldon T. Harvey, III, Esq.
Deutsch, Kerrigan & Stiles
For Defendant

This action was brought by plaintiff, a longshoreman employed by Atlantic and Gulf Stevedores, Inc., for personal injuries allegedly sustained while working aboard the M/S. LOPPERSUM, a vessel owned and operated by defendant, N. V. Stoomvaart Maatschappij. Atlantic and Gulf Stevedores, Inc. was made a third-party defendant in this action, but the con-

troversy between defendant and third-party defendant was compromised prior to trial and the third-party complaint was dismissed.

The plaintiff contends that his alleged injury, lost wages and medical expenses were occasioned by the unseaworthiness of the vessel, in particular that rollers were not supplied to "bull" the cargo in the hold, and the weight of the cargo was too great for the number of handlers on the operation.

The defendant contends that the vessel was in all respects seaworthy, that the officers, crew and/or agents of the vessel and the vessel owner were in no way negligent vis-a-vis the plaintiff, and that the injury resulted from the plaintif's own inadvertence, lack of diligence, and want of due care, or, alternatively, by reason of operational negligence, or instantaneous unseaworthiness, for which plaintiff cannot recover against these defendants.

The case was tried to the Court on March 2, 1970, and after having heard the testimony adduced at trial, and having considered the arguments of counsel, the Court finds that there should be judgment in favor of defendants and against the plaintiff, dismissing the plaintiff's suit at his costs, and, in connection therewith, enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1.

On August 30, 1968, plaintiff was employed as a longshoreman by Atlantic and Gulf Stevedores, Inc. aboard the M/S LOPPERSUM, which was then moored in the Mississippi River, in the Port of New Orleans. At the time of the injury complained of, the plaintiff was directing the activities of a loading gang, made up of plaintiff and nine other longshoremen, in the upper tween deck of the vessel's No. 3 hatch and had been working as a longshoreman for about one and one half years.

2.

Atlantic and Gulf Stevedores, Inc., an independent master stevedore, had contracted to load cargo aboard the M/S LOPPERSUM which loading operation was under its complete charge and direction. The plaintiff and his work force were, at the time of the alleged accident, engaged in stowing in the No. 3 hatch bundles of finished lumber approximately twelve feet in length, two feet wide, and two feet high, weighing between 800 and 1000 pounds each.

3.

Approximately eight such bundles of lumber were stowed in the tween deck, most of which were partially in the square of the hatch and partially protruding beneath the deck. The remaining bundles were stowed

entirely in the square of the hatch. None were stowed in the wings of the ship or completely under the deck.

4.

The bundles were lowered into the hold while suspended from a fall line at each end. The lines were moved near the center of the bundle and the lumber moved by means of the ship's gear as far under the deck as possible. The line closest to the coaming would then be removed and with the remaining line positioned near the end of the bundle in the square of the hatch and with said end being held up by the cargo fall, the longshoremen, positioned at the hatch end, would push and "snake" the bundle into place. Such method was usually employed under the circumstances with reasonable safety and did not require men to position themselves in the cramped area in which plaintiff chose to place himself.

5.

One of the last bundles of lumber in the top tier of cargo was being stowed in this manner, so that approximately three feet of its length were beneath the deck. It was then moved approximately two feet more under the deck with the ship's gear, whereupon plaintiff elected to go beneath the deck to "guide" the bundle into place. To end of the bundle projecting into the square of the hatch was suspended from the cargo fall, while the other holdmen were pushing the bundle into place. Plaintiff contends that while he was "guiding" the lumber in this manner, he injured his back.

6.

The bundle in question was stowed in accordance with customary stowage procedure. Although there were ten men in the gang, only seven were performing this operation because that number was all that could effectively work around the bundles to stow the lumber in the above described manner. More hands could not be used in the operation in which customarily only five are used. Three of the men who were assisting in the stowing of the bundles in question and who, along with plaintiff, were experienced longshoremen, were called as witnesses by the plaintiff. Three other men who were engaged in the operation and the remaining three men in the gang, who did not assist, did not testify. The proof fails to establish that the vessel was inadequately or improperly manned.

7.

Although rollers are sometimes used when cargo of this type is stowed entirely in the wings of the hold, where the ship's gear cannot be used to assist in stowing it, they were unnecessary to move this particular bundle an additional one foot. Moreover, the bundle was not being moved a sufficient distance to allow it to be rolled off rollers. There was insufficient clearance between the top of the bundle and the bottom of the coaming to raise the bundle and remove rollers had their use been attempted. The evidence shows there was a clearance of between six inches and eight inches between the top of the

bundle of lumber and the coaming. Joe Saavedra, an Atlantic and Gulf superintendent for one year, a foreman for ten years and longshoreman for five years, was aboard the M/V LOPPERSUM on August 30, 1968. His testimony establishes that rollers used for this purpose were generally eight inches, ten inches, or twelve inches. In his experience, Saavedra had never seen rollers small enough to be used in this particular operation.

8.

Plaintiff, as leader of the loading gang in hatch No. 3, chose to complete the loading operation by going beneath the deck to guide the lumber into place. Neither the plaintiff nor any of the other longshoremen requested that rollers be furnished. Rollers were unnecessary and unusable for the operation being performed under the prevailing conditions. Other bundles of lumber had previously been stowed in this hold in the same manner without mishap. The longshoremen made no report to their foreman that any trouble in stowing the load had been encountered.

9.

The injury allegedly occurred at 6:45 P.M., but the plaintiff did not report it to his foreman until approximately 7:45 P.M. He then continued working until 10:00 P.M. when his shift was completed.

10.

No ship's officers or personnel were in the vicinity when the bundle of lumber was being stowed, and they were not aware of the method of stowing. All personnel working in the hold were those employed by Atlantic and Gulf Stevedores, Inc.

11.

Plaintiff was examined on August 31, 1968, by Dr. Samuel A. Romano and found to have sustained a sacroiliac sprain. Dr. Romano discharged him as able to return to work on September 25, 1968, and plaintiff did in fact return to work for the period ending September 30, 1968.

Thereafter, he claimed further trouble with his back and on November 7, 1968, he was examined by Dr. Jules E. Isaacson, Jr., who found no gross abnormalities, muscle spasm or neurological defects in his lower back and lower extremities. Dr. Isaacson was of the opinion that the plaintiff was, at that time, capable of working.

He returned again to work in December 1968 for about one week. A longshoremen's strike was in effect from December 20, 1968 to February 22, 1969.

After the strike, he worked intermittently until June 2, 1969 since which date he has worked regularly.

12.

During plaintiff's period of disability following the accident, he was paid $176.81 in longshoremen's and harborworkers' compensation benefits; Atlantic and Gulf Stevedores, Inc. also paid medical expenses.

13.

There was no negligence attributable to the defendant herein, and the M/S LOPPERSUM was in all respects seaworthy.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction over this matter under the Admiralty and General Maritime Law of the United States, and venue is properly laid in the Eastern District of Louisiana. 28 U.S.C. 1333.

2.

The plaintiff herein was a member of the class of persons to whom the shipowner owes an absolute and non-delegate duty of providing a seaworthy vessel. *Sea Shipping Co.* v. *Sieracki*, 328 U.S. 85, 104, 66 S.Ct. 872, 881, 1946 AMC 698, 704 (1946); *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 1944 AMC 1 (1944).

3.

The shipowner's liability for unseaworthiness is generally predicated on whether in hull, gear and personnel the ship was reasonably fit for the purposes of her voyage. *Ondato* v. *Standard Oil Co.*, 210 F.2d 233, 1954 AMC 573 (2d Cir. 1954); *June T., Inc.* v. *King*, 290 F.2d 404 (5th Cir. 1961). To be inadequately or improperly manned is a classic case of an unseaworthy vessel. *June T., Inc.*, supra; *Waldron* v. *Moore-McCormack* [redacted], 386 U.S. 724, 87 S.Ct. 1410 (1967). The vessel here was not undermanned.

4.

The burden of proving the existence of an unseaworthy condition, and that the unseaworthiness was the proximate cause of the injury rests upon the party asserting the same. Norris, the *Law of Seamen*, Vol. II, §626 at 729; *Quintero* v. *Sinclair Refining Co.*, 311 F.2d 217, 1963 AMC 1968 (5th Cir. 1963).

5.

The law does not impose upon the defendant the burden of an insurer, nor is he under a duty to provide an absolutely accident-proof ship. Although the shipowner must provide a reasonably safe place to work, the standard required is not perfection. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 2d 1941 (1960); *Freitas* v. *Pacific-Atlantic Steamship*

Co., 218 F.2d 562 (9th Cir. 1955); *Ross* v. *S/S Zeeland*, 240 F.2d 820 (4th Cir. 1957). The defendant had no duty to supply the best, or the most modern or perfect gear, so long as the cargo handling method used was reasonably suitable for the work to be performed. Even if the loading job could have been made easier by using other implements, the failure to provide these would not, of itself, render the vessel unseaworthy. *Reed* v. *M/V Foylebank*, 415 F.2d 838 (5th Cir. 1969). The equipment furnished aboard the vessel must be reasonably fit for the use for which it was intended. Norris, supra; *Mitchell* v. *Trawler Racer, Inc.*, supra. The question is whether the method of stowage of the lumber was, under the circumstances, a safe means by which reasonably careful persons could perform the duties required of them. The evidence shows that the equipment was reasonably fit for use in stowage of this cargo, and that the method of stowage was reasonably safe. The plaintiff's election to go beneath the deck may have been imprudent, but this decision was his own and was not ordered or recommended by the vessel owners or the stevedoring company for which he worked.

6.

The plaintiff has failed to prove by a preponderance of the evidence that the defendant did not furnish plaintiff a seaworthy vessel, nor has the plaintiff shown by a preponderance of the evidence that his injury was caused by any negligence attributable to the defendant, or by an unseaworthy condition.

7.

Plaintiff's injury was the result of his own actions and not of any unseaworthy condition, insufficient personnel or equipment, or improper or reasonably unsafe method or negligence on the part of anyone except himself.

The Clerk will enter judgment for the defendant, dismissing the complaint at plaintiff's costs.

(Signed) EDWARD J. BOYLE, SR.
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
April 1st, 1970.

Supreme Court, U.S.
FILED
SEP 23 1971
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

~~NO. 1682~~ 70-148

WENDELL N. DeBOSE,

Petitioner,

versus

THE M/S LOPPERSUM, etc., et al,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1682

WENDELL N. DeBOSE,

Petitioner,

versus

THE M/S LOPPERSUM, etc., et al,

Respondents,

Brief In Opposition To Petition For Certiorari

OPINION BELOW

The findings of fact and conclusions of law of the District Court may be found in Appendix B of the petition. The opinion of the Court of Appeals for the Fifth Circuit is reported at 438 F2d 643.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the evidence warranted finding that respondent's vessel, in particular the stow of lumber, was unseaworthy.

STATEMENT

This litigation concerns the familiar contest between longshoreman and shipowner resulting from personal injury received in the course of stevedore operation aboard a vessel. Petitioner, having had his day in court, and, having lost, appealed to the Fifth Circuit Court of Appeals, which affirmed the findings and conclusions of the District Court in a *per curiam* decision. Briefly, the District Court found that petitioner was the author of his misfortune; and, that his loss was not occasioned by any unseaworthiness of respondent's vessel.

ARGUMENT

The issue in this case deals with factual analysis and no amount of strained semantics can convert it into one warranting review by this court on certiorari. The overriding inaccuracy, which pervades the entirety of petitioner's brief, is the inaccurate assumption that the stow was unseaworthy. The basis for a finding of unseaworthiness, petitioner says, is the foreman's testimony (Petition, p. 2 ftn. 1) that the longshoremen did not slide the bundle into position on the first try.

I

THE DECISION BELOW IS CLEARLY CORRECT

The foreman guessed and suggested possibilities as to why the load did not glide into place. However, the District Court concluded, that from his position on the weather deck, the foreman was unable to view the actions of the longshoremen in the hold (Amendment to Findings

of Fact and Conclusions of Law, App. p. 45).* But even if the load had rubbed against something, this in itself would not constitute unseaworthiness as a matter of law. It is within the context of the norm of reasonable fitness that the concept of unseaworthiness must be considered; the test is not perfection. *Mitchell v. Trawler Racer, Inc.*, 362 US 539 (1960). On these facts, the finding of the District Court, that petitioner failed to prove by a preponderance of the evidence that respondent's vessel was unseaworthy, is entirely correct.

II

THERE IS NO CONFLICT OF DECISION

Petitioner cites *Waldron v. Moore-McCormack Lines, Inc.*, 386 US 724 (1967) and *Usner v. Luckenbach*, 397 US 933 (1971), in a futile attempt to point up a conflict between these cases and the decision of the Fifth Circuit in the present case. *Waldron* concerned an improvident order on the part of the ship's mate in assigning too few men to perform a designated task. Recovery was allowed on the basis of the negligent order. The decision of the Fifth Circuit in the instant case is concordant with *Waldron*; it held that the District Court did not err in concluding from the evidence that petitioner's election to go beneath the deck was his own decision and *was not ordered* by respondent's personnel or the stevedore (App. A of Petition, p. 2A). The decision of the Fifth Circuit is in harmony with *Usner* because, contrary to petitioner's assumption, there was no unsafe condition.

* This amendment was omitted in the petition.

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

It is suggested by petitioner that the traditional protection offered those to whom the warranty of seaworthiness is due, is in jeopardy; thus, petitioner contends, an important question of federal law hangs in the balance. The fact that petitioner disagrees with the lower courts' interpretation and analysis of the evidence, does not make an important federal question.

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 US 220, 227.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CORNELIUS G. VAN DALEN

New Orleans

September , 1971

PROOF OF SERVICE

I, Cornelius G. Van Dalen, one of the attorneys for respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the day of September, 1971, I served three copies of the foregoing brief in opposition of respondent on Wendell DeBose by mailing the same in duly addressed envelopes, with first-class postage prepaid, to Clifton S. Carl, Esq., 1020 National Bank of Commerce Building, New Orleans 70112, counsel for petitioner, Wendell DeBose.

CORNELIUS G. VAN DALEN